United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6047

UNTIED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

MARIA EISENHAUER, on her own behalf and on behalf of her children, FRANCIS X. EISENHAUER and BRIAN F. EISENHAUER,

Plaintiff-Appellant,

-against-

CASPAR WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare,

Defendant-Appellee

Docket No. 75-6047

APPELLANT'S BRIEF

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RELEVANT PORTIONS OF THE SOCIAL SECURITY ACT AND REGULATIONS

Social Security Act, §202(d)(1):

> Every child (as defined in section 216(e)) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child --
>
> (A) has filed application for child's insurance benefits,
> (B) at the time such application was filed was unmarried...and,
> (C) was dependent upon such individual --...
> (ii) if such individual has died, at the time of such death,...
>
> shall be entitled to a child's insurance benefit...

Social Security Act, §202(d)(4):

> A child shall be deemed dependent upon his stepfather or stepmother at the time specified in paragraph (1)(C) if, at such time, the child was living with or receiving at least one-half of his support from such stepfather or stepmother.

Social Security Act, §203(a):

> Reduction of insurance benefits - maximum benefits
> (a) Whenever the total of monthly benefits to which individuals are entitled under sections 402 and 423 of this title for a month on the basis of the wages and self-employment income of an insured individual is greater than the amount appearing in column V of the table in or deemed to be in section 415(a) of this title on the line on which appears in column IV such insured individual's primary insurance amount, such total of benefits shall be reduced to such amount;...

Social Security Act, §216(e):

> (e) Child. The term "child means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died,...
>
> For purpose of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B), would have been a valid marriage.

Social Security Act, §216(h)(1)(B):

> ...For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage.

Social Security Regulations, 20 C.F.R., §404.1113:

> "Living with" and "living in such individual's household."
> (a) Defined. "Living with" as used in sections 202(d)(3), 202(d)(4), 202(d)(8), 202(d)(9), and 216(h)(3) of the Act, as amended and "living in such individual's household" as

used in section 216(e) of the Act mean the parent and child are sharing the same residence and that the the parent is exercising or has the right to exercise parental control and authority over the child. As used in this section, the term "parent" includes a natural parent, legally adopting parent, stepparent, and the foster parent as to whom the child-claimant has the status of "child" under a theory of "equitable adoption."

DECISION BELOW

The decision below was rendered by the Honorable Walter Bruchhausen, U.S. District Judge, E.D.N.Y. The decision is not officially reported.

STATEMENT OF THE ISSUES

1. Can children who are not the natural, adopted or legal stepchildren of a deceased wage earner be deemed to be his stepchildren for purposes of child's insurance benefits, under §216(e) of the Social Security Act, on the basis of an invalid marriage ceremony which their mother and the deceased went through in bad faith?

2. If so, did the Administrative Law Judge apply the wrong standard of proof or otherwise err in failing to find that the uncontroverted evidence that these children were not dependent upon the deceased at the time of his death, and were receiving support from their own father, refuted any deemed dependency status enjoyed by these children under §202(d)(4) of the Social Security Act?

3. In any case, was there substantial evidence in the record to establish in the first instance that these children were "living with" or receiving one-half of their support from the deceased at the time of his death, as defined by §202(d)(4) of the Act and 20 C.F.R. §404.1113?

STATEMENT OF THE CASE

This is an appeal from the order of the District Court dismissing appellant's complaint requesting review of the Secretary's decision. This case was brought pursuant to §205(g) of the Social Security Act.*

This is a factually unusual case involving competing claims for Social Security survivors benefits. The claimants include: (a) the wife and natural legitimate children of the deceased (appellant and her children; (b) illegitimate children of the deceased by Sonja Radauscher; and (c) Sonja's other children by a previous marriage who are not the deceased's natural, adopted or legal stepchildren and who received regular support from their own father. It is the eligibility of this latter group of children that the appellant is challenging before this Court.

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* Except where otherwise indicated, section number references will be to the Social Security Act. Except for the first digit, these numbers run parallel to the Section numbers in Title 42, U.S.C. (i.e., Social Security Act §202 is the same as 42 U.S.C. §402).

FACTS AND PRIOR PROCEEDINGS

The appellant, Maria Eisenhauer, and the deceased, Francis E. Eisenhauer, were married in 1951 and had two children, Francis X. and Brian F. Eisenhauer (22a)* In or about September, 1965, Maria and the deceased separated and thereafter did not live together (23a). Pursuant to a Separation Agreement, the deceased continued to provide regular support for Maria and their two children (122a-133a). The marriage, however, continued until Francis E. Eisenhauer died in 1970 (28a).

Some time subsequent to September, 1965, Francis E. Eisenhauer began living with Sonja Radauscher. Sonja, who married Andreas Radauscher in 1957, was divorced from Andreas on March 7, 1966.

Sonja had seven children (23a). At least four of those children (Monika, Andreas, Erich and Wilhelm Radauscher) were fathered by Andreas Radauscher, who continued to provide them with regular support payments after the divorce (23a, 185a, 200a-202a). Two of the children (Sonja L. and Ursula M. Eisenhauer) were concededly fathered by the deceased, Francis E. Eisenhauer (23a). The paternity of Francis, Jr., conceived before, but born after Sonja's divorce from Andreas, was intentionally left undecided by the Administrative Law Judge (23a, 25a).

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* All such references throughout this brief are to the joint appendix filed with the Court in this proceeding.

Both Sonja and the deceased quite obviously were aware of the deceased's marriage to the appellant and that, as a result, a marriage ceremony between them would be without legal significance (see Point I, B, p. , infra). Nevertheless, on August 14, 1969, Sonja and the deceased apparently went to Elkton, Maryland, where the deceased lied on an application for a marriage license, and they went through a wedding ceremony (24a). Less than ten months later, on June 9, 1970, Francis E. Eisenhauer died while on a business trip in Rhode Island (24a). At the time of his death, he was fully insured under §214(a) of the Social Security Act.

On June 29, 1970, appellant Maria A. Eisenhauer, filed claims with the Social Security Administration for benefits for herself, as the deceased's widow, and for her two children, Francis X. Eisenhauer and Brian F. Eisenhauer (98a-101a, 102a-105a). The claims were approved and benefits were awarded to the appellant and her children in an amount equal to the family maximum amount (106a).

On April 28, 1972, Sonja filed a claim for benefits on the record of the deceased on behalf of Monika, Andreas, Erich and Wilhelm Radauscher, her children by Andreas (167a-170a). With her claim, Sonja submitted a concededly invalid Maryland marriage certificate between her and the deceased (171a). She had previously submitted

a claim on behalf of her three other children whom she claimed were fathered by the deceased (163a-166a).

In May, 1972, Sonja's claim was approved for all seven children (194a-196a). Because they had been receiving the maximum family benefits, the payments to appellant and her two children were reduced drastically. Their survivor's benefits were reduced from almost $400.00 per month to less than $120.00 (107a).

After being notified of this determination by the Social Security Administration, Maria requested a Reconsideration, protesting the severe reduction which she and her two children suffered as a result of the benefits received by Sonja's children. The Reconsideration Determination sustained the award to Sonja's children and consequent reduction to Maria and her children (108a-115a), and the appellant requested a hearing.

On July 25, 1973, after hearing, the Administrative Law Judge sustained the award of benefits to all of Sonja's children (19a-29a). With respect to Sonja's children by her previous marriage, his finding of eligibility was based on his application of §216(e) of the Social Security Act to the invalid "marriage certificate" submitted by Sonja (21a). Section 216(e) states that a child may be deemed a "stepchild" for the purposes of benefits on the basis of a ceremonial-marriage which was invalid because of a legal impediment. The reduction in payments to

appellant and her children was based on the requirement of §203(a) that each individual's benefit be proportionately reduced to keep total benefits within the family maximum (22a).

Appellant appealed to the Appeals Council, which affirmed the Administrative Law Judge (13a). Whereupon this action was commenced. Following motions for summary judgment, the District Court affirmed the appellees' decision in conclusory terms (224a-228a). The opinion merely recited some of the findings of the Administrative Law Judge and accepted those findings and conclusions in-toto. No mention was made of the fact that appellant did not in the District Court challenge the benefits awarded to Sonja's illegitimate children by the deceased but challenged only, as she does here, the benefits awarded to Sonja's children by her previous marriage to Andreas Radauscher. Nor was there any discussion of the specific issues raised by the appellant.

As applied by the Administrative Law Judge and the District Court, Section 203(a), requiring proportionate reductions in benefits, and Section 216(e) defining "stepchild," have yielded a bizzare result.

A substantial portion of the survivor's benefits received by legitimate natural children of the deceased who were dependent upon the deceased for support while he was alive, have been taken from them. As will be shown,

infra, these benefits have in turn been awarded to children who: (a) are not the deceased's natural children, adopted children or legal stepchildren; (b) who the deceased had no legal obligation to support and who, the record strongly suggests, were not dependent upon the deceased (see Point II, infra); and (c) who received regular and substantial support from their own father. The appellant believes that this result is unjust and is not supported by the law or the administrative record.

ARGUMENT

I. CATEGORICAL ELIGIBILITY: "DEEMED" STEPCHILDREN

A. Sonja's children by her previous marriage were deemed to be the deceased's "stepchildren" under the "ceremonial marriage" provisions of §216(e).

Section 202(d)(1) of the Social Security Act provides that a "child" of a deceased insured wage-earner may be eligible for child's insurance benefits if he meets the definition of "child," set forth in §216(e). Section 216(e) makes natural children, adopted children and stepchildren of an insured individual eligible for child's insurance benefits. Sonja's children by her previous marriage to Andreas Radauscher are not the natural children, nor adopted children, nor actual stepchildren of the deceased, and no such claim has been made. The deceased was married to the appellant. Maria Eisenhauer, until his death and was never married to Sonja (28a).

There is a provision in §216(e), however, under which a child will be "deemed" to be the "stepchild" of an insured individual if the insured and the child's parent:

> went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment described in the last sentence of subsection (h)(1)(B) would have been a valid marriage.*

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*The legal impediments described in §216(h)(1)(B) include only an impediment: "(1) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or, (ii) resulting from a defect in the procedure followed in connection with such purported marriage."

Notwithstanding that the deceased was still married to the appellant, Sonja and the deceased obtained a marriage certificate and apparently went through a marriage ceremony in August, 1969 (171a, 209a-210a). It is by virtue of that ceremony that Sonja's children were found by the defendant-appellee to come within the "deemed stepchild" proviso of §216(e) and therefore categorically eligible for child's insurance benefits (§202(d)(1); 25a).

B. A requirement of "good-faith" is implicit in the "ceremonial marriage provisions of §216(e). The sham marriage ceremony between Sonja and the deceased, cannot render Sonja's children by her previous marriage eligible for benefits.

The Administrative Law Judge conceded, and the record strongly suggests that Sonja and the deceased went through the marriage ceremony in August, 1969, in bad faith and with full knowledge on the part of both participants that it was without validity. The Administrative Law Judge, however, held that good faith was not required (59a, 62a-63a, 70a-71a, 84a, 90a, 114a, 181a). At very least there is a serious doubt about the parties' good faith. The District Court did not specifically address the issue but rather accepted the findings and conclusions of the Administrative Law Judge in-toto (228a).

It is implicit in the "ceremonial marriage" provisions of §216(e), however, that there be at least a modicum of good faith present. The very use of the words "resulting in a purported marriage," as used in §216(e), implies as much. This issue is purely one of law and is therefore within the ambit of this court's review. See, e.g., Celebrezze v. Wifsted, 314 F.2d 208, 210 (8th Cir. 1963); Conlay v. Ribicoff, 294 F.2d 190, 194 (9th Cir. 1961); Henderson v. Flemming, 283 F.2d 882 (5th Cir. 1960); Schoultz v. Weinberger, 375 F.Supp. 929 (E.D. Wis. 1974).

1. Policy

While §216(e) does not mention "good faith" expressly, it is inconceivable that Congress would intentionally leave the Social Security Administration vulnerable to outright fraud in ceremonial marriages used as a basis for Social Security benefits elibigility. Fraud is not knowingly countenanced by the Social Security system and there is no indication that the "ceremonial marriage" provision of §216(e) was intended for different treatment. Without considering whether or not the parties in this case acted with fraudulent intention, there can be no doubt that the effect of the defendants' reading of this provision is to permit and even encourage sham marriages to be fraudulently utilized to obtain Social Security benefits.

In fact, the policy against permitting sham marriages to be used to secure Social Security payments is fundamental to the Social Security Act to the point that it can overcome the general policy of liberality in granting benefits. This policy holds for child's insurance benefits as well as benefits for surviving spouses. Weinberger v. Salfi, __U.S.__, 43 U.S.L.W. 4985 (1975).

> The danger of persons entering a marriage relationship not to enjoy its traditional benefits, but instead to enable one spouse to claim benefits upon the anticipated early

> death of the wage earner, has been recognized from the very beginning of the Social Security program. 43 U.S.L.W. at 4993.

See also: Jimenez v. Weinberger, 417 U.S. 628, 636 (1974); Stanton v. Weinberger, 502 F.2d 315, 320 (10th Cir. 1974).

2. Case Law

Those courts which have considered the "ceremonial marriage" provision under a parallel provision of §216 for illegitimate children,* albeit not directly, have assumed as a matter of course that good faith is an implicit ingredient in the operation of these provisions. Moots v. Secretary, U.S. Department of Health, Education and Welfare, 349 F.2d 518 (4th Cir. 1965), cert, denied, 382 U.S. 996 (1965), held that an illegitimate child of the deceased was not entitled to child's insurance benefits where none of the requirements under §216(h)(2) had been satisfied. The court stated at 349 F.2d 521:

> Nor can Diane be deemed to be Clarence's child, for Social Security benefit purposes, under §416(h)(2)(B) because that subparagraph requires the mother and father in good faith to have gone through a marriage ceremony which but for the existence of a legal impediment would have resulted in a valid marriage.

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*Section 216(h)(2)(B) contains a "ceremonial marriage" provision for illegitimate children which is identical to the provision in §216(e) for "step" children. Besides common statutory language, the two pvosisions share a common statutory origin; Social Security amendments of 1960, 70 Stat. 924. See also pp. 19 infra.

Similarly, in Jimenez v. Weinberger, supra, 417 U.S. at p. 634, 635, the Court discussed benefits for illegitimate children under the Social Security Act and stated:

> Under the statute it is clear that illegitimate children born after the wage earner becomes disabled qualify for benefits if state law permits them to inherit from the wage earner, §416 (h)(2)(A); or if their illegitimacy results solely from formal, nonobvious defects in their parents' ceremonial marriage, §416(h)(2)(B);.... [emphasis added]

The reasonable assumption is that "nonobvious defects" refers to the parties themselves and excludes defects which are obvious to the parties. There are few defects, if any, which are knowable only by the parties and by no one else. Furthermore, the defect in the marriage ceremony which Sonja and the deceased went through was the fact that the deceased was at all times married to Maria Eisenhauer. As mentioned above, this defect was substantial, notorious and quite obvious to anyone who might have inquired.

Unlike this case, both Moots and Jimenez, supra, dealt with illegitimate children. The rights of illegitimate children, however, are carefully guarded in the law and are afforded greater legal protection than are stepchildren, (compare, e.g., Levy v. Louisiana, 391 U.S. 68 (1968) and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-176 (1972) with Steed v. Imperial Airlines, 12 Cal. 3d 115, 524 P.2d 801 (Cal. Sup. Ct. 1974), appeal dismissed 43 U.S.L.W. 3447 (2/18/75). Thus, when illegitimate, natural

children do not qualify for child insurance benefits on the strength of a bad-faith marriage ceremony, then Sonja's children by her previous marriage - who are not the deceased's real stepchildren, and who continued to receive support from their own father (185a, 202a) - a fortiori do not qualify for benefits under §216(e). The inequity is magnified here since the benefits paid to these children caused the benefits paid to the deceased's natural children, both legitimate and illegitimate, to be drastically reduced (107a).

3. Legislative History

There is no indication that Congress, in enacting this "ceremonial marriage" provision, intended that marriage ceremonies undergone in bad faith should be accepted for purposes of §216(e). To the contrary, it is quite clear that Congress envisioned nothing of the sort.

The "ceremonial marriage" provision for "deeming" stepchildren, under §216(e), dates from the Social Security Amendments of 1960, 70 Stat. 924. At the same time, similar ceremonial provisions were enacted for the benefit of certain illegitimate children (§216(h)(2)(B))*and certain would-be

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*Section 216(h)(2)(B):
(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through the marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B) would have been a valid marriage.

spouses (§216(h)(1)(B).*

Referring to all three "ceremonial marriage" provisions, the House Report states:

> certain dependents and survivors of insured workers would also benefit by provisions included in the bill which (1) authorize the benefits on the basis of certain invalid ceremonial marriages contracted in good faith... (House Report No. 1799, 86th Congress, Second Session (June 13, 1960), p.4)

Again referring to all three "ceremonial marriage" provisions, the House Report, a few pages later, makes it clear that the situations intended to be covered by these provisions do not include the circumstances of this case:

> Since the state laws governing marriage and divorce are sometimes complex and subject to differing interpretations, a person may believe that he is validly married when he is not. (Id, p. 16).

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*Section 216(h)(1)(B):
(B) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual,...but it is established to the satisfaction of the Secretary that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, and such applicant and the insured individual were living in the same household at the time of the death of such insured individual... such purported marriage shall be deemed to be a valid marriage. The provisions of the preceding sentence shall not apply...(ii) if the Secretary determines, on the basis of information brought to his attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage.

In reporting the Social Security Amendments to the full House on June 22, 1960, Wilbur Mills, Chairman of the House Ways and Means Committee, stated:

> In addition to the above, the bill provides for benefits in certain situations where a marriage is legally invalid, although entered into in a bona-fide manner. (Congressional Record, 86th Congress, Second Session, Part 10, p. 13,811).

The House passed the Social Security Amendments on June 23, 1960, without further debate on the three "ceremonial marriage" provisions and the bill went to the Senate (Id, part 11, p. 14,054). The Senate Report, prepared by the Senate Finance Committee, is identical to the House Report in referring to these provisions. (Senate Report No. 1856, 86th Congress, Second Session, (August 10, 1960), pp. 13, 22). When the bill was reported on the floor of the Senate, on August 10, 1960, Senator Byrd, speaking for the Senate Finance Committee, stated:

> Certain dependents and survivors of insured workers would also benefit by provisions included in the bill which - effective with the month of enactment - would first authorize benefits on the basis of certain invalid ceremonial marriages contracted in good faith. (Congressional Record, 86th Congress, Second Session, Part 13, p. 16,884). Again,

Again, Senator Byrd was referring to all three ceremonial marriage provisions.

The clear message that good faith is an implicit part of the ceremonial-marriage provisions of §216 is unaffected by the differences in language in the "stepchild" and "illegitimate child" provisions on one hand (§216(e) and (h)(2)(B)),* and the "spouse" provisions on the other (§216(h)(1)(B)).** The "ceremonial marriage" provision for spouses suggests that the Secretary is to make a finding of good faith, or absence of bad faith, and that the applicant has the burder of proof of establishing good faith to the "satisfaction of the Secretary." The absence of such language in §216(e) and (h)(2)(B) governing "stepchildren" and certain "illegitimate children" does not necessarily mean that good faith is not implicit in these provisions. It can also mean that when the applicant is a child, there is no requirement that the applicant actually make such a showing or that the Secretary actually make such a finding. This interpretation is logical because it would, of course, often be difficult or impossible for an applicant for child's insurance benefits to prove his or her parents' motivation.

In summary, while the appellant recognizes that there is a general policy within the Social Security program favoring eligibility, it is nevertheless not irrational for Congress to deny benefits to this class of "deemed"

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*See p.11 and footnote, p. 17, supra.

**See footnote, p. 18, supra.

stepchildren based on their parents' good or bad faith in going through the marriage ceremony, when the alternative is to invite fraud - something which the Social Security system avoids wherever possible - and violate another of the system's fundamental policies. Weinberger v. Salfi, supra.

In fact, the Social Security policy favoring payment of benefits to those who are dependent upon them, such as Maria Eisenhauer and her children, necessitates that fraud and bad faith by others be protected against when it may result in reducing the benefits of those who are clearly entitled to and desperately need those benefits. Given Congress' clear-cut expectation in enacting the "ceremonial marriage" provisions that it provide relief for bona-fide mistakes and good faith attempts to marry, and given that §216(e) does not on its face preclude such a requirement, it would do violence to Congress' intention, the fundamental policy against the use of sham marriages, and the integrity of the Social Security system itself, if the level of benefits to those clearly entitled to and in need of them were not protected against spurious claims. Yet this would be the case if at least some degree of "good faith" were not treated as a requirement for being deemed a "stepchild." Since this was a case of bad faith, these children cannot be "deemed" the stepchildren of the deceased for purposes of eligibility for benefits.

II. ACTUAL ELIGIBILITY: REQUIREMENT OF DEPENDENCY

Under §202(d)(1), a surviving child of an insured wage earner who seeks child's insurance benefits, and who falls within the §216(e) definition of "child," must also show that he or she:

> (c) was dependent upon such individual...at the time of such death...

There is no evidence in the hearing record that Sonja's children by her previous marriage were actually dependent upon the deceased and the Hearing Decision makes no such finding (20a-29a). In fact, neither the hearing decision or the District Court's opinion directly indicates whether, or by what means, the dependency requirement of §202(d)(1)(c) was satisfied (20a-29a, 224a228a). At the administrative hearing, it was stipulated that Sonja and the deceased began "living together" subsequent to September, 1965 (23a), and this was a finding made by the Administrative Law Judge and accepted by the District Court (18a, 224a228a).* It was this finding, applied with the aid of §202(d)(4), which presumably formed the basis for the Administrative Law Judge's and District Court's conclusion that Sonja's children by her previous marriage should receive benefits at the expense of Maria Eisenhauer and her children.

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*§202(d)(4), a "deemed dependency" provision, was cited by the District Court (228a), but is nowhere mentioned in the hearing decision (20a-29a). §202(d)(4) is discussed at Point II(B), p. 30 infra.

A. The Administrative Law Judge and the District Court failed to adequately evaluate the evidence in the record establishing that Sonja's children by her previous marriage were not dependent on the deceased at the time of his death.

The appellant is convinced that, on the basis of the evidence in the hearing record, the Administrative Law Judge and the District Court could not have properly concluded that Sonja's children by her previous marriage satisfied the "deemed dependency" provision for stepchildren, §202(d)(4), even in the first instance. [This is discussed at Point IIB, infra.] Notwithstanding, §202(d)(4), however, the Administrative Law Judge fatally erred in failing to find that any deemed dependency status was refuted, as to these children, by the uncontroverted evidence that they were not in fact dependent on the deceased at the time of his death. He did so by applying an incorrect legal standard and by failing to adequately evaluate the evidence in the record. Since the District Court accepted the findings and conclusions of the Administrative Law Judge in-toto, (224a-228a) the District Court similarly erred.

1. The Standard of Proof Required by the Administrative La Judge To Refute Deemed Dependency, Was Erroneous.

At the administrative hearing in this case, the Administrative Law Judge properly permitted appellant, Maria Eisenhauer, to present evidence that Sonja's children were not dependent upon the deceased for the greater part

of their support (72a).* In doing so, however, the Administrative Law Judge required appellant to

> establish what their requirements for support were, how much was contributed, that it was in fact, contributed, and that it constituted more than half... (72a-73a) (also 87a).

Moreover, appellant was required to make this showing for each child (86a).

In the first place, in light of the divorce decree requiring Sonja's ex-husband, Andreas Radauscher, to pay $70.00 per week for the support of his children (202a) and Sonja's admission that he paid this support regularly (185a), it was incorrect to require further proof of "how much (Andreas) contributed, (and) that it was in fact cntributed" (73a).** Second, it is unreasonably beyond the ability of the appellant or anyone in her position to prove what the specific support requirements were for each of Sonja's children, and the statute puts no such burden on

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*At the hearing, the appellant was challenging the eligibility of all seven of Sonja's children - the children by her previous marriage as well as her illegitimate children by the deceased. In this Court, as she argued in the District Court, the appellant is challenging only the eligibility of Sonja's children by her previous marriage.

**In this regard the Administrative Law Judge's ruling that "you haven't established that he made the payments" (86a) is patently erroneous.

on the appellant. This is especially true in light of the Administrative Law Judge's refusal to subpoena Sonja as a witness (60a, 61a, 62a, 63a, 83a, 86a, 87a).*

Third, and more basic, the standard of proof required of the appellant by the Administrative Law Judge was unreasonable since it is not logically required. It is not necessary to know the specific support requirements of each child in order to establish to a rather high degree of certainly that these children were not dependent on the deceased at the time of his death. It is certainly possible to prove this by other means. For example, the same showing can be made by: (a) starting with the deceased's total available income; (b) subtracting all the expenditures which are known not to have been spent in support of these children; (c) determining thereby how much (or how little) could have been spent to support these children; and (d) comparing the support which is known to have been supplied by their father, Adnreas Radauscher (185a, 202a).

The correct legal standard of proof in evaluating the evidence in an administrative record is, of course, a matter of law. This Court can therefore correct the error made by the Administrative Law Judge on this point. Celebrezze v. Wifstad, supra; Conlay v. Ribicoff, supra; Henderson v. Flemming, supra; Schoultz v. Weinberger, supra.

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*The Administrative Law Judge was empowered to subpoena Sonja and compel her testimony under §205(d) of the Social Security Act and 20 C.F.R. §404.926.

2. From the uncontroverted evidence in the record, it is extremely unlikely that the children by Sonja's previous marriage were dependent upon the deceased at the time of his death.

Having applied an incorrect standard in evaluating the record, the Administrative Law Judge did not adequately consider the entire record, as he is required to do. Covo v. Gardner, 314 F.Supp. 894, 899 (S.D.N.Y. 1970); Vitek v. Finch, 438 F.2d 1157 (4th Cir. 1971). Moreover, where the Secretary's determination is in clear disregard of the overwhelming weight of the evidence, this Court must modify or reverse that decision. Vitek v. Finch, supra, at p. 1158. When the entire record in this case is considered, the suggestion is overwhelming that Sonja's children by her previous marriage were not dependent upon the deceased at the time of his death.

To begin with, there is not the slightest bit of direct evidence in the record that the deceased contributed anything for the support of these children. They were, moreover, neither his natural children, nor his adopted children, nor even his legal stepchildren. He owed them no obligation, and they had no right to any support.

On his 1969 Federal Income Tax return, dated just a few weeks before his death, the deceased claimed as dependents: (a) appellant's two children (i.e., his legitimate children); and (b) his illegitimate children by Sonja (215a). He did not, however, claim Sonja's children by her previous marriage as dependents even though he would have been expected to claim them if he contributed a substantial portion for

their support. The 1969 Income Tax return, therefore, serves as the deceased's admission that he did not contribute the greater part of their support.

Nor has Sonja ever suggested that these children received support of any kind from the deceased. In 1970, when she applied for insurance benefits on behalf of the deceased's illegitimate children, Sonja took pains to describe how they had been supported by the deceased (166a); she made no such claim when she later applied for benefits on behalf of the children from her previous marriage (167a-170a). Likewise, in her twelve-page letter to the Social Security Administration of February 24, 1975, Sonja never mentions support for these children, although she discusses the deceased's illegitimate children at length (181a-192a). She also concedes that the deceased had no interest in her New Jersey home or furnishings which, if they lived there, would have been utilized by these children of her previous marriage (213a).

An examination of the figures in the record strongly suggest the reason why no one has claimed that these children were dependent upon the deceased for support. Francis Eisenhauer, the deceased, was not a wealthy man. His income was not substantial to begin with and a good part of it was paid in alimony and child support for the support of the appellant and her children (131a, 132a, 215a, 219a).* In addition, the deceased's income was the sole source of support for his illegitimate children by Sonja. On

*This was by virtue of a Separation Agreement. The deceased and the appellant were not divorced.

the other hand, the children of Sonja's previous marriage received $3640.00 per year - $70.00 per week - from their father, Andreas Radauscher (185a, 202a).

According to his 1969 Federal Tax return, the deceased's total income after taxes (federal income and net - FICA) was $18,576.* Even if we subtract from $18,576 only those expenditures that we are absolutely certain were not used to support these children, only $9,340 remains.** The actual amount of such expenditures, although not necessarily reflected in the tax return, is undoubtedly higher.

At this point, we can determine the absolute maximum that the deceased could have been contributing for the support of these children, provided certain assumptions are made which are neither favorable to the appellant nor necessarily supported by the evidence: (a) the deceased, Sonja and all seven of her children lived in the same household at the time of his death; (b) the only income available for the support of those nine individuals, aside from the deceased's income, was the $3640 per year ($70 per week) which Andreas Radauscher

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*215a, 220a-222a.

**Deceased's After-Tax Income (215a, 220a-222a) $18,576
less:

child support (appellant's children) (131a-2a)	$3640	
alimony (219a)	5233	
union dues (219a)	103	
charitable contributions (219a)	260	
		9,236
		$ 9,340

paid in child support for his children (185a, 202a); and (c) the available income was shared equally within the household.

In those assumptions are made, the total available income available for support of that nine person household in 1969 was $12,980,* or $1442 per person. Insofar as Sonja's children by her previous marriage are concerned, however, the overwhelming majority of that $1442 per person available for support, or $910,** was provided directly to them in child support payments by their real father, Andreas Radauscher. It is abundantly clear that they would have received only a small portion of their support from the deceased if, indeed, they received anything at all.

All of the evidence in the record from which this estimate is derived is uncontroverted. The estimate, moreover, is not merely speculative; if anything, it is quite conservative. Furthermore, it should be viewed in the context of the Administrative Law Judge's repeated refusal, at the hearing, to grant the appellants' request that Sonja be subpoenaed to testify (60a, 61a, 62a, 63a, 83a, 86a, 87a).

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*Total of deceased's income not otherwise accounted for.....$ 9,340

Child support payments by Andreas Radauscher..... 3,640

Total income available for support of household.....$12,980

**$70 per week, or $3,640 per year for the four children is the equivalent of $910 per year in child support for each child (185a, 202a).

In short, the uncontroverted evidence in the record will support no other finding than, at least, that Sonja's children by her previous marriage were not dependent upon the deceased at the time of his death for the greater part of their support. At most, it is proper to conclude that they received no support at all.

B. The findings of the Administrative Law Judge, accepted by the District Court, and the evidence in the Hearing Record are insufficient to satisfy the "deemed dependency" provision of §202(d)(4).

As stated above, §202(d)(1) contains a requirement of dependency. In aid of stepchildren initially meeting this requirement, §202(d)(4) states:

> a child shall be deemed dependent upon his stepfather or stepmother at the time specified in paragraph (1)(c) if, at such time, the child was living with or receiving at least one-half of his support from such stepfather or stepmother.

The words "living with," as used in §202(d)(4) are defined in the Social Security Regulations in pertinent part as follows:

> ...the parent and child are sharing the same residence and... the parent is exercising or has the right to exercise parental control and authority over the child. As used in this Section, the term "parent" includes a...stepparent... (20 C.F.R. §404.1113)

Taken together, §202(d)(4) of the Act and §404.1113 of the Regulations require a finding that before a child may be "deemed dependent" upon his "stepfather," the following conditions must be present at the time of the wage earner's death:

(1) "living with":
(a) the parent and child must share the same residence, and
(b) the parent must exercise or have the right to exercise parental control and authority over the child

or

(2) the child must be receiving at least one-half of his support from the stepparent.

To be eligible for benefits on the basis of these "deemed dependency" standards, the Administrative Law Judge must make one of these alternative findings and his finding must be supported by substantial evidence. (Social Security Act, §205(b) and (g)). See, e.g., Richardson v. Perales, 402 U.S. 389, 401 (1971); Julian v. Folsom, 160 F.Supp. 747, 750 (S.D.N.Y. 1958). Whether or not the record contains substantial evidence to support a finding is a matter of law for the court to decide. Julian v. Folsom, supra.

(1) "One-half Support" - As discussed in Point II(A) supra, there was no finding of support (20a-29a) and the hearing record is devoid of any evidence of support.

(2) "Parental Control" - The Hearing Decision (20a-29a) contains no finding of fact that the deceased exercised or had the right to exercise parental control and authority over Sonja's children by her previous marriage and the record is devoid of evidence upon which a finding of parental control and authority could have been based. In

the absence of a finding or of substantial evidence in the record to support such finding, it is impossible to conclude that the deceased was "living with" the children as defined by the Regulation (20 C.F.R. §404.1113). Consequently, §202(d)(4) of the Act is not satisfied.

(3) "Sharing Residence" - The Hearing Decision contains a finding that Sonja and the deceased began living together subsequent to September, 1965 (28a). It contains no finding of fact, however, that the deceased was living with Sonja at the time of his death, or if living with her, that he was "sharing the same residence" with the children of her previous marriage (20a-29a). The assertion by the District Court that:

> The Administrative Law Judge concluded that the wage earner was living with Sonja and her seven children at the time of his death
> (228a)

is simply inaccurate.

Nor does substantial evidence in the hearing record necessarily support a finding of "sharing the same residence" with these children. In her affidavit of June 8, 1973, Sonja Radauscher stated that the insured "never had an interest whatever" in her house and property, and "had no interest in any furniture, fixtures, furnishings or the contents of said house and premises." (213a). Sonja was the sole owner of her house and lot in New Jersey (204a). The

State Supreme Court, on the other hand, has declared that the deceased, Francis Eisenhauer, was a resident of Queens at the time of his death (149a) and his death certificate contains the same Queens address (150a, 212a). In addition, the deceased gave his address as Queens, New York, on the application for a marriage license he obtained with Sonja (209).

To rebut this evidence concerning the residence of the deceased, there are only Sonja's self-serving statements in a letter to the Social Security Administration (181a) and in her application for child's insurance benefits (169a), the original death certificate obtained by Sonja (118a, 142a, 145a), and the deceased's 1969 Federal Tax Return and W-2 forms (215a-223a).

There is no other evidence in the hearing record concerning the residence of these children at the time of Francis Eisenhauer's death. The District Court referred to a Social Security district office investigation report which concluded that the deceased was "living with or supporting and fathering" his illegitimate children by Sonja (227a). Even that report, however, is silent as to Sonja's prior children (179a).

In determining whether substantial evidence exists to support one or more of these findings, this Court's consideration must not be limited to those portions of the evidence considered by the Administrative Law Judge, but

must include those portions in the entire record which detract from as well as those which support a finding. Cove v. Gardner, 314 F.Supp. 894, 899 (S.D.N.Y. 1970). Appellant must once again note that her repeated requests during the hearing for the Administrative Law Judge to subpoena Sonja to testify on these issues were denied (60a, 61a, 62a, 63a, 83a, 86a, 87a).

In summary, even in the first instance, the evidence in the hearing record and the findings of the Administrative Law Judge, accepted in-toto by the District Court, are demonstrably inadequate to satisfy any of the alternative methods of establishing " deemed dependency" under §202(d)(4) of the Act and §404.1113 of the Regulations.

CONCLUSION

This Court should reverse the decision of the appellee and of the District Court insofar as they award child's insurance benefits, on the wage record of the deceased, to Sonja Radauscher's children by her marriage to Andreas Radauscher, and correspondingly reduce the benefits payable to the appellant and her two children.

The appellee should be directed to re-compute the benefits payable to the appellant and her children based upon the ineligibility of Monika, Andreas, Erich and Wilhelm Radauscher, who have been determined not to be the natural children of the deceased (28a, 226a), and to pay appellant and her two children the full retroactive benefits to which they are entitled. The case should be remanded to the appellee for determination of the issue, left undecided at the hearing, whether the deceased was the father of Sonja's child, Francis E. Eisenhauer (27a). In addition, appellant should be granted such other and further relief as this Court deems proper.

DATED: New York, New York
August 28, 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIA EISENHAUER, on her own behalf and on behalf of her children, FRANCIS X. EISENHAUER and BRIAN F. EISENHAUER,

Plaintiff-Appellant,

-against-

CASPAR WEINBERGER, Individually and in his capacity as Secretary of the Department of Health, Education and Welfare,

Defendant-Appellee.

AFFIDAVIT OF SERVICE BY MAIL

Docket No. 75-6047

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 3 Haven Plaza, New York, New York.

That on the 28 day of August, 1975, deponent served the within APPELLANT'S BRIEF upon David G. Trager, U.S. Attorney, 225 Cadman Plaza East, Brooklyn, NY the address designated by said attorney(s) for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Elizabeth Melendez

Sworn to before me this
28 day of August, 1975.

Philip M. Kassel

PHILIP M. KASSEL
NOTARY PUBLIC, STATE of NEW YORK
No. 31-4662520
QUALIFIED in NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1976

NOTARY PUBLIC